Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

ROBERT W MUSSER,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Robert W Musser
Petitioner
12740 Ginami St
Anchorage, AK 99516
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37pp

ISSUES PRESENTED FOR REVIEW

1. The Internal Revenue Service stated the statue of limitations to file for a overpayment of taxes. The Petitioner complied. The credit of the refund was increased and allowed but the refund was refused stating a different statue of limitations for refunds.

Is it just to allow the government to confiscate a citizen's assets based on its own error? Would the Federal Court system allow a private enterprise to enrich itself in this manner? There is a difference in opinon between Circuits.

2. Does the date when taxes are "deemed paid" determined by and under applicable statute rule or a confused interpretation of the Internal Revenue Code argued by the government?

3. Their is a color of discrimination in the District Court and the Ninth Circuit against citizens without the funds to hire a member of the bar.

The Petitioner states he did not find justice or fair, equal treatment in these Courts. The conduct is so far departed from the accepted and usual course of judicial proceedings (Supreme Court Rule 10.1(a) that the call for this Court's power of supervision is requested and should be provided.

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I.

JURISDICTION

A timely filed Petition for Rehearing was denied by the Ninth Circuit on Nov 15, 1996. This Petition is filed in accordance with Supreme Court Rule 13.4 and as provided for in 28 USC 2101(c).

This Court's jurisdiction is invoked under 28 USC 1254 (1).

II.

STATEMENT OF THE CASE

The Petitioner notified the Internal Revenue Service (IRS) that he would file his income tax return late with an over payment of taxes. The IRS stated the time period to the month as to when the statute of limitations for a refund would expire. The Petitioner complied. The credit was allowed but the refund was refused stating a different statue of

limitations. The Petitioner sued in District Court.

III.

BACKGROUND OF THE CASE

This case involves the Government refusing to return a citizen's assets. The assets are an over payment of taxes and a subsequent tax refund suit. There is no dispute that the ownership of these assets belongs to the Petitioner. The government simply is hiding behind a false argument to prevent the petitioner from having legal recourse to enforce the proper return of his assets.

The Petitioner owned out of state real estate that was being managed by a Realtor. The management of the apartment complex became behind in the bookkeeping, also covering accumulating losses. The Internal Revenue Service was notified that the income tax return was going to

be filed late. The Petitioner was advised that there was no penalty as long as the taxes were over paid.

The Petitioner asked if there was a statute of limitations on the time for filing a claim for the overpayment of taxes. The time requirement was stated by the IRS, the months were counted out by the agent and the tax return and the refund claim was filed within that stated statute of limitations.

The tax return was accepted, the refund was reviewed and increased, allowing the credit, but the IRS stated the time for requesting the refund had passed.

The Petitioner filed suit in US District Court. He approached several attorneys and it was clear the $29,000 of the Petitioner's assets that the IRS was confiscating, was a gamble and required a large monetary cost the Petitioner was

unable to pay. Remarks made by counsel included: "you need to know the judge works for the government too", "the government has unlimited resources and they will use them against you".

As a naive citizen, the Petitioner filed this action expecting to find justice in the US Courts to recover his assets on what should have been resolved in a very simple dispute.

The District Court ruled for the Government, acknowledging the assets were the Petitioner's but would not force the Government to return them. The statute of limitations is a shield from prosecution, not a change of ownership.

The District Court was clearly mistaken legally, morally, and acted without justice. In the appeal to the Ninth Circuit, the Justice Department, chose not to defend its winning argument

in the District Court, but agreed with the Petitioner that they did not agree with the District Court's ruling, the issue being appealed. The Justice Department, in defending a Constitutional argument based on equal protection under the law, went on to prove the statute of limitations for refund claims starts when the return is filed, not when it is due. The Justice Department proved their prior claim untrue by producing quotes from the Congressional explanation in passing the law. Clearly, the Justice Department is stating they knowingly misrepresented the law to the District Court. (Appellee Brief, Page 14, 9/)

The Justice Department still uses this argument that they state is incorrect against other citizen's to confiscate their assets. This two faced approached to litigation and ultimately an abuse of power by the government was

acknowledged by this court in Rosenman v United States, 323 US 658,(1945). This is the Supreme Court's last case on this subject of when "taxes are deemed paid". The Ninth Circuit states this case does not apply anymore because of a change in the law.

After stating they did not agree to the District Court's opinion, the Justice Department requested that the case should be dismissed (not remanded, blocking the Petitioner's right by statute to appeal the final ruling of the district court) on other grounds not in the appeal. This is all in the same footnote. (Appellee's Brief, P14)

The Ninth Circuit honored the Justice Department's request and dismissed the case on the other grounds, without remand, for the benefit of the Government. The other grounds not in

the appeal are directly against 26 USC 7422(d) when the "taxes are deemed paid". The Ninth Circuit ruled the taxes were deemed paid when the taxes are due, not when the credit is allowed.

The Petitioner, seeking "Due Process" and "Justice", filed a Civil Rule 60(b) motion in District Court quoting the statute passed by the Congress of the United States dealing with the statute of limitations of when taxes are "deemed paid for refund suits".

The Justice Department did not answer this Motion and went into default. When a default judgment was requested by the Petitioner, the Justice Department stated by affidavit that they were unaware of the Court's rule that they were required to answer the motion. The Court waived the limitation period for the Justice department and allowed them to file outside of the Court's rules.

In response to the original complaint, the Government argued that the taxpayer had to know the laws even if the government provided bad advice. Here, clearly showing a bias, if not prejudice, the Court again honored the Government's request.

The Court denied the default judgment and dismissed the Civil Rule 60(b) motion as an inappropriate procedure.

The Petitioner filed a Civil Rule 59 motion, showing the procedure to be correct, clearly showing the Court in error. The Court reversed its ruling to hear the prior motion and then dismissed the prior motion.

The Court again repeated the Justice Departments argument (same nature as the misrepresented argument abandoned in the 9th Circuit), and did not address the

controlling statute passed by Congress, the basis of the motion.

In the second appeal, the Justice Department recognized the new argument of 26 USC 7422(d) but claimed estoppel barring the Petitioner from now bringing this issue up because the appeals court had ruled in the first appeal on their footnote request of the issue of when the taxes are "deemed paid".

During this appeal, it was pointed our that in another case, one of the three judges of the Ninth Circuit, sitting in judgment over the Petitioner, had previously been reported to the Federal Bureau of Investigation for having the oversight responsibility of a transcript in his court, having the strong appearance of being altered. The Petitioner pointed our this fact and stated that not only had the F.B.I. not done anything about the strong appearance

of criminal conduct in the Judiciary, but that the Judge, now on the Ninth Circuit, had no business sitting in authority over the Petitioner. The local F.B.I. is stated to comment that "they had trouble with these judges too".

All this was ignored, the Appeals Court dismissed the appeal in behalf of the Government, stating nothing new was being presented as requested by the Government's counsel. The appeals court never ruled on the controlling Statute passed by Congress.

All claims of justice, equal protection, due process, etc., were denied on the first appeal.

In the Petitioner's service to this Country, he has been a nuclear warhead courier and custodian. He felt he was risking his life for this country. He knows that this document is pointed, yet

he did not serve his country to stand by and condone this clear abuse by the Government. It is also clear to the Petitioner that just the appearance of this type of abuse can destroy the mutual respect of the Citizenry toward the Government.

IV.

ARGUMENTS

The controlling statute at issue is 26 USC 7422, Civil Actions For Refund:

> (d) Credit treated as payment
> The credit of an overpayment of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be <u>deemed to be a payment</u> in respect of such tax liability <u>at the time such credit is allowed.</u>

The Government acknowledges it allowed the credit, using 7422(d) all statute of limitations were meet in a timely manner. The Ninth Circuit in error states "Musser's 1984 tax was deemed paid on April 15, 1985". The date

the taxes were due. The basis of the denial of the Appeal. (Page 9, Appendix)

The government agrees in the first appeal (opposed to its winning argument in District Court) that "a claim for credit or refund may be filed within 3 years from the date the return was actually filed". Under the old law "a claim for refund or credit must be filed within 3 years form the due date of the return" (Page 19, Appellee's brief, first appeal, Ref I.R.C. 6511.a)

The Justice department argues in their second brief that the Petitioner's "claim for refund is untimely under Internal Revenue Code (I.R.C.) 6511(b)(2)(a)" because "that provision limits the amount of refund" ... "to the amount of tax paid during the period immediately preceding the filling of the claim, equal to three years". (Page 19,

Respondent's/Appellee's brief, April 18, 1995)

This argument has no logical base. Why would a tax payer, after filing his return, pay additional taxes during the interim of filing a tax return and then 3 years later file a claim for refund? This would be the conditions required to the government's argument in satisfying the limitations of 6511(b)(2)(a). In applying the law, 26 USC 7422(d), the Justice Department has no argument.

Outside of the "spinning" of the Internal Revenue Code by the government for their own advantage, the issue they are trying to defend here is when the taxes are "deemed paid". The statue states the taxes are "deemed paid" when the credit is allowed, not the lower court's ruling that the taxes are deemed paid when the "taxes are due". (Appen P9)

The last case in the Supreme Court

ruling on when taxes are "deemed paid" was Rosenman v United States, 323 US 658, 1945. This court acknowledged in 1945 that the government did not litigate in good faith and argued both sides of the same law to confiscate citizen's assets. The ruling in this case was the taxes are "deemed paid" when the taxpayer intended. The Ninth Circuit states in Elhe v United States, 720 F2d 1096 (9th Cir. 1983), that Rosenman does not apply any more because the law has changed.

The 9th Circuit has clearly erred in not using the controlling 26 USC 7422(d).

2.

In Cascade Utilities v United States, (1990, CC Or) Lexis 802, the court sat in justice stating:

> "the IRS was estopped from asserting that the refund claims were untimely filed where the IRS provided incorrect information to the taxpayer, causing a late filed

refund claim."

The IRS misrepresented the statute of limitations and should not benefit, not with penalty, but the complete confiscation of the tax payers overpayment of taxes.

This court has ruled that when the sovereign consents to be sued, it enters the court with no other advantage, If the government can show that other entities in society can benefit by their own err, maybe they can defend a "due process" and "equal protection argument".

The Petitioner does not believe the Federal Court system would allow any other entity to benefit from its own misrepresentations or error. The benefit being, keeping someone else's assets.

The Petitioner requests the Supreme Court to uphold the justice in the ruling in Cascade as the standard for the Government's conduct.

The Petitioner realizes the first concept of justice is situational and that the law library is full of unhappy litigants with stories of abuse. In addition, it is clear that the language requirements of the judicial forum are very specific and dealing with non professional citizens are a burden and I am sure a frustration for the Courts. Given that, human nature and evolution of dealing with the public has appeared to have harden some in the Judiciary.

The Petitioner submits he was clearly denied due process by the 9th Circuit by dismissing his appeal on grounds not in the appeal, denying his statutory right to an appeal of a final order from a District court. The net effect, the Appeals court was acting as a court of original jurisdiction.

The Petitioner remedied the process by filing the Civ Rule 60(b) motion back in District Court, but the District Court would not even address the mistake in law. The Petitioner requested oral arguments in the District court. The request was ignored and the Court when on and stated in its dismissal that oral arguments were <u>not</u> requested.

The Petitioner does believe that the transcript, in another case in the same District, was altered. This claim was made after the first appeal when the identification of the judges were made. Respectively, all the judges in the 9th Circuit are aware of this claim in an En Banc review, denied. It is in appropriate for a 9th Circuit judge to sit in authority over the Petitioner with this type of a complaint filed.

The issue of the Government not defending and abandoning its wining

District Court argument is a practice that no other legal professional would attempt. It confers, that the Government expects preferential treatment by the Court. It was granted.

The Petitioner submits his "due process" rights were violated demonstrating bias. The conduct of the lower Courts toward Pro Se litigates needs review and oversight supervision from this Court.

CONCLUSION

The controlling statute for when "taxes are deemed paid" that starts the statute of limitations is clear and direct. The Ninth Circuit states the taxes are deemed paid when the taxes are due in direct opposition to the law. The District Court and the Ninth Circuit Court refused to mention or address it.

The Justice Department proved

Congress's intent in passing 26 USC 6511 was to give the taxpayer 3 years after the return was filed to make a tax refund claim similar to the time period used for collection of taxes due. The lower Courts constitently use the date the taxes are due at the request of the Justice Department which is clear abuse.

It is not justice for the government to be allowed to confiscate a citizen's assets and benefit from its own error. It should not be allowed and is not allowed in the Federal Court system except for the Government.

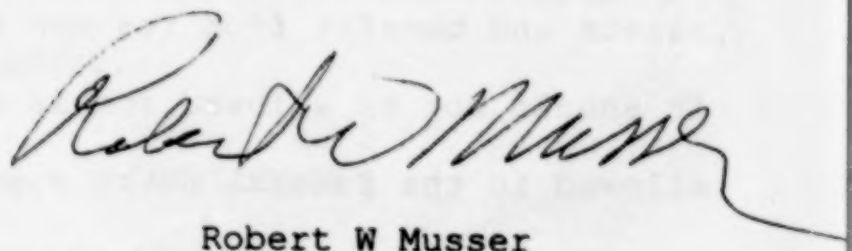
A citizen of limited means, dealing in a court system with a tone of prejudice, a Justice Department of unlimited means willing to argue cases it knows is not just, has a very difficult time finding justice.

This process, conduct, and lack of

adjudication is so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. (Sup CT Rule 10.1a)

THE PETITIONER RESPECTFULLY requests that this petition be granted.

SUBMITTED this 28th day of April, 1996.



Robert W Musser
Petitioner

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W MUSSER, Plaintiff,	)	No 94-36103
v.	)	
UNITED STATES, Defendant.	)	DC No CV91-063

Before: ALARCON, FERNANDEZ, and RYMER.

Robert W Musser appeals pro se the district court's denial of his motions for reconsideration in his action seeking a refund of his federal income taxes for the tax year 1984. We have jurisdiction pursuant to 28 USC 1291. We review for abuse of discretion, Backlund v Barnhart, 778 F2d 1386, (9th Cir. 1985), and we affirm.

Because the time for filing an appeal from the district court's denial of Musser's first motion for reconsideration was extended by Musser's second motion for reconsideration, we have jurisdiction over the district

court's denial of both motions.

The district court did not abuse its discretion by denying Musser's motions for reconsideration. It appears that the only ground for granting Musser's motion would be to find that "extraordinary circumstances" exist under Rule 60(b)(6) because Musser filed his motion over two years after the district court entered judgment. Compare Fed R. Civ. P. 60(b)(6) (must be filed within a reasonable time) with Fed R. Civ. P. 60 (b)(1)-(3) (must be filed within one year after entry of judgment). Musser, however failed to show that such circumstances exist. Instead, Musser merely reiterated the same arguments which the district court and this Court previously considered and rejected

Accordingly. the district court did not abuse its discretion by denying Musser's motions for reconsideration.

Backlund, 778 F 2d 1388; see also Palomo v Baba, 497 F2d 959, (holding that where a Rule 60(b) motion is made after the district court's judgment is affirmed on appeal, the district court must act in conformance with the mandate).

AFFIRMED.

CATHY A CATTERSON
Clerk of Court

J J Ross
Deputy Clerk
Nov 24 1995

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ROBERT W MUSSER,)
Plaintiff,)
v) No A91-063-CIV (HRH)
UNITED STATES,)
Defendant.) ORDER
)

Plaintiff has filed a Motion to Alter Judgment under Rule 59, Federal Rules of Civil Procedure. The motion is opposed. Oral argument has not been requested and is not deemed necessary.

This has been a most difficult case; and plaintiff is, if nothing else, persistent.

Judgment was entered in the United States District Court on Nov 4, 1991. Plaintiff appealed/ The Ninth Circuit Court of Appeals affirmed the judgment of the district court, although on grounds other than those set out by the district court. After remand of the case to this court, plaintiff moved for relief from judgment. That motion was denied. Now, the motion first mentioned above is ripe for

consideration.

It appears to the court that plaintiff's Rule 59 motion is technically untimely. The court chooses to waive the time requirement of Rule 59 to consider this motion.

As the observed earlier in denying plaintiff's motion for relief from judgment, "(i)t is quite apparent that neither the government nor the plaintiff is happy with the respective courts' disposition of this case." Order, Motion for Relief from Judgment, Clerks Docket No 31 at 2. that situation has not changed. Plaintiff still makes the same arguments that he has made all along.

Plaintiff accuses the government attorneys of misrepresentation. The court does not see the matter that way. The government presented this court with two conflicting points of view on the principal legal issue in this case; and this court made its ruling. Plaintiff appealed and the Ninth

Circuit Court of Appeals made its decision. There is simply no factual or legal basis for this court to alter its decision.

Plaintiff's Motion to Alter Judgment is denied.

DATED at Anchorage, Alaska, this 14 day of September, 1994.

Holland
United States District Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W MUSSER, Plaintiff- Appellant, v UNITED STATES, Defendants-Appellee.	No 92-35264 D C No Cv-91-063 MEMORANDUM

Before: BEEZER, KOZINSKI, AND KLEINFELD, Circuit Judges.

Robert W Musser appeals pro se the district court's dismissal of Musser's action seeking a refund of his federal income taxes for tax year 1984. the district court concluded that the action was time-barred because Musser failed to file a timely administrative claim. We have jurisdiction pursuant to 28 USC 1291. We affirm.

Musser filed his 1984 tax return on November 28, 1988, claiming a refund of $25,933.43 based on overpayment of taxes. On January 2, 1989, the IRS notified Musser that it had corrected an error in his tax return

and that the amount of overpayment was actually $29,462.91. On February 13, 1989, the IRS notified Musser that his claim for refund had been disallowed on the ground that the claim was filed beyond the statutory limitations period. Musser subsequently file this action in district court seeking a refund of taxes pursuant to 26 USC 7422. The district court dismissed the action on the ground that it was time-barred.

Before bringing an action for refund of taxes in district court, a taxpayer must pay the tax in full and file a timely administrative claim for refund. 28 USC 1346(a)(1); 28 USC 7422(a); Yuen v United States, 825 F2d 244. An administrative claim for refund must be filed within three years from the time the return was filed or within two years from the time the tax was paid, which ever is later. 26 USC 6511(a). These statutory prerequisites are jurisdictional. Yuen, 825 F2d 245.

The district court held that the three-year limitations period of section 6511(a) applies only when the taxpayer timely files a tax return. Because Musser had not filed a timely return, and because Musser's refund claim was filed more than two years after the tax was paid, the district court found that the claim was untimely.

There is a split of authority as to whether the three-year limitations period set out in section 6511(a) applies only to timely returns. Compare Swannack v IRS, 92-1 U S Tax Cas. (CCH) 50,082 (W. D Wash. May 30, 1991) (three-year limitations period applies only to timely returns) and Arnzen v IRS, 91-1 US Tax Cas. (CCH) 50,020 (W.D. WAsh. Dec 3, 1990) (same) with Becker v Department of Treasury, 823 FS 231, 232 (S.D.N.Y 1993) (three-year limitations period applies to late returns) and Mills v United States, 805 FS 448, 450, (E.D. Tax 1992) (same). We need not reach this issue, however.

Musser's 1984 tax was deemed paid on April 15, 1985. See 26 USC 6513(b)(1) & (2). Section 6511(b)(2)(A) provides that a claim for refund filed within the three-year period, plus any extensions. Musser's claim for refund was filed on November 28, 1988, more than three years after the tax was paid. See 26 CFR 301.6402-3(a)(5) (federal income tax return requesting refund may be treated as administrative claim for refund). Thus, even assuming that the three-year limitations period applies to late returns and that Musser's claim was therefore timely under section 6511(a), Musser's claim is nevertheless barred by section 6511(b)(2)(A).

Musser contends that his overpayment of taxes for 1984 should have been automatically credited as a payment of his estimated taxes for 1985. This argument lacks merit. The election to have an overpayment of taxes credited to the subsequent year must be made with the applicable statutory limitations period for claim for refund. See 26 USC 6402(b), 6513(d), 6513(d); 26 CFR 301.6402-2(a). For the same reasons that Musser's claim for refund was not timely, as discussed above, his election, which was made in his return filed on November 28, 1988, was also not timely. 1/

AFFIRMED.

1/ Musser also contends that the limitations period for refund claims is unconstitutional because the United States is allowed a longer period to recover erroneously refunded taxes. This argument is meritless.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT W MUSSER	)	No 94-36103
Plaintiff	)	
v.	)	DC No CV91-00063
UNITED STATES	)	Alaska
	)	

ORDER

Before: ALARCON, FERNANDEZ and RYMER

The pane has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
Nov 15, 1995
Cathy A Catterson
Clerk